91-1933

(1)

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

David M. Washburn, Petitioner

v.

State of Washington, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied his right to due process of law when the Washington Court of Appeals failed to independently review his sufficiency-of- evidence claim pursuant to the Constitutional standard dictated by this Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560 (1979)?

2. Did the Washington Court of Appeals err in failing to reverse Mr. Washburn's conviction for Malicious Mischief in the Second Degree based on the failure of the Government to prove beyond a reasonable doubt that he had caused damage in excess of $250.00? [Pursuant to Supreme Court Rule 24, this issue will be fully briefed if this Court accepts review.]

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Olympia, Wa. 1990 20

I. REFERENCE TO PREVIOUS OPINIONS

The only document that could be considered an "unofficial opinion" in this case, pursuant to Supreme Court Rule 14.1(d), is the ruling of the Commissioner to the Washington Court of Appeals dated July 8, 1991. See, Appendix, pp. A1-12.

The Order denying Mr. Washburn's Petition for Review to the Washington Supreme Court is noted at 118 Wn.2d 1022 (1992).

II. STATEMENT OF JURISDICTION

A. David M. Washburn seeks review of the Washington Supreme Court Order dated March 3, 1992 denying Mr. Washburn's Petition for Review. 118 Wn.2d 1022 (1992). See, Appendix, pp. C-15.

This Court has jurisdiction to review the Washington Supreme Court Order denying

review pursuant to 28 U.S.C. §§ 2102, 2104, and 2106.

B. This Petition for Writ of Certiorari is based upon the following constitutional provisions and state statutes. See, Appendix, pp F-23.

1) The Fourteenth Amendment to the United States Constitution;

2) Article I, Section 22 of the Washington State Constitution;

3) Revised Code of Washington (hereinafter RCW) Section 9A.48.080, defining the crime of malicious mischief in the second degree;

4) RCW Section 9A.48.010(1)(b), defining the term "damages;" and

5) RCW Section 9A.56.010(12)(a) defining the term "value."

III. STATEMENT OF THE CASE

Petitioner, David M. Washburn, was charged by Information in State Court with the crime of Malicious Mischief in the Second Degree for an incident allegedly occurring on September 30, 1989. One element of the crime charged is property damage in an amount exceeding $250.00. Mr. Washburn was convicted, as charged, by a jury.

The testimony at trial alleged that Mr. Washburn struck and broke the windshield of a 1989 Nissan pickup truck belonging to another person. Only two prosecution witnesses testified regarding the amount of property damage. The owner of the truck testified that he had replaced the

windshield.[1] However, there was no testimony about the actual cost of replacement. Rather, the owner of the vehicle merely speculated that had he not replaced the windshield, the truck would have been worth at least $500 less than what he paid for it.[2]

The Government also presented testimony by the owner of an automobile glass company in the area, Rick Adelstein. Mr. Adelstein testified that his price for replacement of

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[1]Q: Have you tried to get the windshield fixed? A: Since that time? Q: Yes? A: It's been replaced. Report of Proceedings, p. 112.

[2]Q: And how much do you think you could get for the truck with a broken windshield? DEFENSE COUNSEL: Objection. Foundation THE COURT: Overruled. A: If I tried to resell it with a broken windshield, someone is going to--is going to knock down my price, saying that they have to pay to get it fixed again; so I would have to say at least $500 less. Report of Proceedings, p. 117.

the windshield of a 1989 Nissan pickup truck would be $275.00 plus tax. He added that it would be "pretty tough to get it for less . . . that probably would be real competitive at $275.00." See, Appendix pp. D16-18.

At the conclusion of the State's case, the Defendant moved to dismiss the charge based on the lack of sufficient evidence as to value. That motion was denied. See, Appendix, pp. E19-20.

On appeal, Petitioner raised the issue of whether the evidence was sufficient to support a conviction for the felony of malicious mischief in the second degree. Specifically, Petitioner raised the question of whether the State had proved beyond a reasonable doubt that the Petitioner caused

more than $250 in damages -- an essential element of the crime.[3]

After the Appellant's Opening Brief was filed, the Court of Appeals Commissioner initiated a "motion on the merits" pursuant to Washington Rule of Appellate Procedure (hereinafter "RAP") 18.14(a). The Commissioner determined that the appeal

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[3] Appellant's Opening Brief, pp.6-11, states:

> Was there sufficient evidence in the record from which the trier of fact could conclude, beyond a reasonable doubt, that David Washburn was guilty of the crime of malicious mischief in the second degree? . . . In this case, the state failed to meet its burden. There was no evidence of exact costs of the damage done to the windshield in the record. . . .
>
> The prosecutor had but to call the actual repairman, or the adjustor for the insurance company, to establish actual damage. He failed to do so and the record is otherwise devoid of proof that over $250 in damage was actually sustained to the truck in question.

should be dismissed without a full review by an Appellate Court Panel. RAP 18.14(e)(1). See, also, State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985). The Commissioner reviewed the issue of sufficiency of the evidence and held that the case was controlled by the Washington Court of Appeals decision in State v. Horner, 53 Wn. App. 806, 770 P.2d 1056 (1989). The Commissioner cited no other authority in support of its ruling granting the motion on the merits and dismissing the appeal. The Petitioner filed a Motion to Modify the Commissioner's ruling before a Washington Court of Appeals panel pursuant to RAP 17.7. This Motion to Modify was denied on November 18, 1991. See, Appendix, pp B13-14. Pursuant to RAP 13.4, Petitioner filed a timely Petition for Review to the Washington Supreme Court on December 18,

1991. In his Petition for Review, Petitioner again raised the Due Process/ sufficiency-of-evidence issue raised initially on appeal.[4] On March 3, 1992, the Washington Supreme Court denied review of this case without opinion. See, Appendix, p. C-15.

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[4] The Petition for Review, pp. 1-2, raised the following issues for review:

1. Was Petitioner denied his constitutional right to appeal when the Court of Appeals denied modification of a Ruling Granting Motion on the Merits, which ruling concluded petitioner's issue of the sufficiency of the evidence to support a conviction was "clearly without merit", but cited as authority a decision involving different and substantially lower standards of proof on review?

2. Was there sufficient evidence of the amount of damages suffered from a broken windshield, as essential element of Malicious Mischief in the Second Degree, when there was no evidence of the actual cost of repair incurred by the victim of the crime?

IV. ARGUMENT

A. REVIEW SHOULD BE ACCEPTED BECAUSE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE STATE COURT OF APPEALS FAILED TO CONDUCT AN INDEPENDENT REVIEW OF HIS SUFFICIENCY-OF-EVIDENCE CLAIM PURSUANT TO THE CONSTITUTIONAL STANDARD OF REVIEW DELINEATED BY THIS COURT IN JACKSON v. VIRGINIA.

Although the United States Constitution may not require state courts to grant appeals of right to criminal defendants,[5] if a state creates an appellate process for criminal defendants, that process "must comport with the demands of the due process and equal protection clauses of the Constitution". Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct 830, 834, 83 L.Ed.2d 821 (1985). The Washington State Constitution, Article 1, Section 22, specifically guarantees that

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[5] See McKane v. Durston, 153 U.S. 684, 14 S.Ct 913, 38 L.Ed. 867 (1898).

criminal defendants have the right to appeal. See, State v. Rolax, supra.

This Court has held that the Due Process Clause of the Fourteenth Amendment requires that a state which provides for the right to appeal a criminal conviction must provide for the right to counsel,[6] the right to transcript of the trial proceedings,[7] and right to effective assistance of counsel. Evitts v. Lucey, supra.

In Addition, the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that a criminal defendant "is afforded protection against

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[6]Douglas v. California, 372 U.S. 353, 83 S.Ct 814, 9 L.Ed.2d 811 (1963).

[7]Griffin v. Illinois, 351 U.S. 12, 76 S.Ct 585, 100 L.Ed. 891 (1956); and Draper v. Washington, 372 U.S. 487, 83 S.Ct 774, 9 L.Ed.2d 899 (1963).

jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the . . . [State] Appellate Courts". United States v. Powell, 469 U.S. 57, 68, 105 S.Ct 471, 478, 83 L.Ed.2d 461 (1984). Specifically, state appellate courts are required by the Due Process Clause of the Constitution to make an independent evaluation of the evidence and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct 2781 61 L.Ed.2d 560 (1979). Accord, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), reversing State v. Green, 91 Wn.2d 431, P.2d 1370 (1979).

In this case, however, the Washington State Appellate Courts failed to review the

Petitioner's sufficiency of evidence claim pursuant to the constitutional due process standard delineated in Jackson v. Virginia. On appeal of his conviction for Malicious Mischief in the Second Degree, Petitioner raised a sufficiency of evidence to challenge the element of value.[8] A Commissioner for the Court of Appeals reviewed the Petitioner's claim and entered an order dismissing the appeal. The Commissioner's

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[8]Malicious mischief in the second degree includes the element that physical damage of property to another in an amount exceeding $250.00. RCW 9A.48.080. "Damages" may be determined by replacement value. RCW 9A.48.010(1)(b). "Value" is the market value of the property or services at the time and in the approximate area of the criminal act. RCW 9A.56.010(12). "Market value" is the price which a well informed buyer would pay a well informed seller where neither is obligated to enter into the transaction. State v. Hancock, 44 Wn. App. 297, 302, 721 P.2d 1006 (1986); citing State v. Rowley, 74 Wn.2d 328, 334, 444 P.2d 695 (1968).

opinion relied exclusively on a state case that did not apply the constitutional standard of review delineated in Jackson v. Virginia.

The Commissioner's opinion cites Jackson v. Virginia, at its outset; however, that opinion fails to apply the Jackson v. Virginia standard to the Petitioner's sufficiency-of-evidence claim. Rather, in support of its conclusion that the Petitioner's appeal should be dismissed, the opinion relies exclusively on State v. Horner, 53 Wn. App. 806, 770 P.2d 1056 (1989).

In State v. Horner the State Court of Appeals reviewed an order of restitution by a trial court in a juvenile proceeding

pursuant to RCW 13.40.020(17) and 13.40.190.[9] In two respects, the standard of review in Horner falls far below the constitutional standard dictated by the United States Supreme Court in Jackson v. Virginia. First, in State v. Horner, the prosecution was never required to prove "value" beyond a reasonable doubt. The standard of proof in a restitution hearing is not beyond a reasonable doubt or even clear and convincing evidence; rather, the government need only meet a "standard similar to that required to prove damages in a tort context". State v. Smith, 33 Wn. App. 791, 796, 658 P.2d 1250 (1983).

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[9] These statutory provisions limit the imposition of restitution in juvenile proceedings to "easily ascertainable damages for injury to or loss of property."

Second, on appeal, an order of restitution is reviewed by an abuse of discretion standard. State v. Horner, supra.

The abuse of discretion standard of review does not involve an independent review of the evidence. Therefore, the standard of review applied in State v. Horner falls far below the sufficiency of evidence standard of review required by Jackson v. Virginia. See, also, State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (reversing prior Washington Supreme Court decision in same case applying "substantial evidence" standard of review to sufficiency-of-evidence claims).

In contrast to the State v. Horner decision, Petitioner offered the Court of Appeals authority from several jurisdictions supporting his challenge to the sufficiency of the evidence in this case. For example,

in Elomary v. State, 778 S.W.2d (Tex. App.) (1989), the court reversed a conviction in a very similar case. The appellant had driven into a combination gas station/car wash. A Ms. Katz attempted to cut in front of the appellant's car in order to proceed first through the car wash. When Ms. Katz refused to move, the appellant drove forward, causing a dent in her car. The appellant was charged with, and convicted of, criminal mischief, a class A misdemeanor, for having caused damage in an amount between $200.00 and $750.00.

The appellate court in Elomary v. State reversed the conviction for insufficient evidence of the amount of damages.

> No testimony exists regarding the actual cost of repairing Katz's car. Although Phillip Wells, an insurance appraiser, testified that the estimated total damage to Katz's Jaguar was $518.40, Katz testified that it did not actually

> cost her $518.40 to repair her car, and that she did not remember exactly how much it cost. . . . No witness testified about the cost of the repair or restoration, and no receipt or other documentation showing the cost of repairing the car was submitted in evidence.

Elomary, supra, 778 S.W.2d at 910. Compare: Bembry v. State, 155 Ga. App. 847, 273 S.E.2d 209 (1980) (evidence clearly sufficient where victim testified to cost of replacing broken windows in automobile, confirmed by repairman who actually did repairs, and repair bill). See also, State v. (Jeffrey Shane) Washburn, 53 Ore. App. 258, 631 P.2d 827 (1981) (property owner's estimate of damages insufficient to support conviction based on amount); and People v. David, 133 A.D.2d 277, 519 N.Y.S.2d 67 (1987).

The authority from other jurisdictions in which the proper standard of review was

applied, underscores the harm caused by the due process violation in this case. Petitioner was convicted based upon insufficient evidence as a matter of law. On appeal, the Washington Court of Appeals Commissioner failed to review the sufficiency of evidence claim pursuant to the Constitutional standard delineated in Jackson v. Virginia. By failing to adequately review his claim on appeal, the Commissioner for the Washington Court of Appeals violated Mr. Washburn's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Both the Washington Court of Appeals and the Washington Supreme Court refused to correct this constitutional error on review created by the Commissioner's reliance on State v. Horner in evaluating the

Petitioner's sufficiency-of-evidence claim . The failure of both the Washington Court of Appeals and the Washington Supreme Court to properly review this case makes review by this Court essential. See, Supreme Court Rule 10.1(c).

Review by this Court is particularly appropriate because the erroneous reliance on State v. Horner by Washington Appellate Courts may effect a significant number of cases. Sufficiency-of-evidence claims are frequently raised on appeal. In Washington State, these claims regularly involve the element of value. In fact, there are four separate felony statutes in Washington where value is an element of the crime charged.[10]

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[10] These statutes are: Theft in the First Degree, Theft in the Second Degree, Malicious Mischief in the First Degree, and Malicious Mischief in the Second Degree. In

Unless this Court accepts review of this case and remedies the constitutional error occurring below, there is a significant possibility that Washington Courts will continue to erroneously rely on State v. Horner in a large number of cases. Therefore, this Court should accept review of this case, and reverse Petitioner's conviction below.

VI. CONCLUSION

This Court should accept review because the Petitioner was denied due process of law when the Washington Court of Appeals failed to conduct an independent review of his

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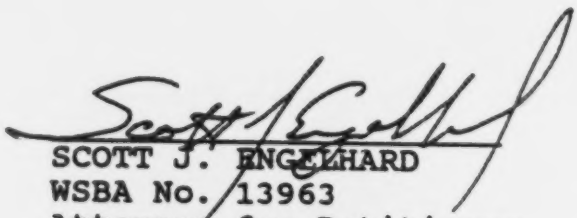
1989 alone, there were 4,557 cases filed in Washington charging either Theft in the First Degree or Theft in the Second Degree. "The 1989 Report of the Courts of Washington," Office of the Administrator for the Courts, Olympia, Washington, pp. 9-3, 9-11.

sufficiency-of-evidence claim pursuant to the constitutional standard of review delineated by this Court in Jackson v. Virginia.

Respectfully submitted this 21st day of May, 1992.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

David M. Washburn, Petitioner

v.

State of Washington, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

APPENDIX FOR PUBLICATION

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent. v. DAVID MICHAEL WASHBURN, Appellant.	NO. 25704-8-I COMMISSIONER'S RULING GRANTING MOTION ON THE MERITS TO AFFIRM

David Washburn appeals from the judgment and sentence entered following his conviction by a jury of malicious mischief in the second degree. The court set a motion on the merits to affirm pursuant to RAP 18.14(a). The motion is granted.

ISSUES

1. Was the evidence sufficient to convict?

2. Has Washburn shown that he has received ineffective assistance of counsel?

FACTS

The incident which gave rise to these charges occurred on September 30, 1989 at a gas station in Bellingham. Washburn was at the station getting gas. A pickup pulled in through the station exit route and parked in front of Washburn. Washburn believed that he had been blocked and asked that the truck be moved immediately. When it was not, he struck the windshield with a windshield squeegee and damaged it. He was charged with, and convicted of, malicious mischief in the second degree.

Part way through trial, Washburn decided to discharge his counsel and thereafter proceeded pro se.

CRITERIA FOR DETERMINING WHETHER TO GRANT A MOTION ON THE MERITS TO AFFIRM

RAP 18.14(e)(1) Provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In

> making these determinations, the ... commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria in light of State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), the commissioner determines that the issues presented are clearly without merit.

DECISION

ISSUE 1. Washburn is represented by counsel on appeal. The sole issue raised by counsel is whether the evidence is sufficient to support a finding that the damage caused by Washburn exceeded $250. In a supplemental pro se brief, Washburn has made four assignments of error. Number 3 is that the prosecutor erred in failing to dismiss the case when he

realized that a mens rea did not exist. Number 4 is that the trier of fact erred by ignoring the facts and giving its emotional support to the victim. To the extent these assignments of error raise sufficiency of the evidence questions they will be addressed under this first issue.

The basic standard of review in determining whether the evidence supports a criminal verdict is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 629 (1980), quoting Jackson v. Virginia, 433 U.S. 307, 319, 61 L.Ed.2d 560, 99S.Ct. 2781 (1979). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence. Green; State v. Lawson, 37 Wn.App. 539, 543, 681 P.2d 867 (1984).

State v. Carver, 113 Wn.2d 591, 604 781 P.2d 1308, 789 P.2d (1989).

RCW 9A.48.080(1) provides:

A person is guilty of malicious mischief in the second degree if he knowingly and maliciously:

(a) Causes physical damage to the property of another in the amount exceeding two hundred fifty dollars; or
...

Barbara Welch, one of the occupants of the damaged truck, testified that Washburn approached her and told her that if she didn't move the truck he was going to bust out her headlights. Washburn then hit the windshield with the windshield squeegee. Welch testified that there was no damage to the windshield before the incident and identified a picture showing extensive cracking in the windshield as what it was like after Washburn hit it. Jacob Nichols, the owner of the truck, testified that there was nothing wrong with the windshield prior to the incident. He also identified a picture of the damage to the windshield as how it was after Washburn struck it. Nichols testified that the truck windshield had been replaced. He was not allowed to testify

before the jury as to the actual cost of replacement. However, he did testify that if he had to sell the truck with a broken windshield, its value would have been diminished by at least $500.00. Richard Adelstein, the owner of Lewis Auto Glass in Bellingham, testified that he had been in the business for 22 years, had owned the business for the past 5 years, and had to replace probably 4,000 windshields in the last year alone. He was asked what the price would be to replace the windshield on this particular truck. He testified that the cost of replacing it would be $275.00 plus tax. He further testified that was wholesale price and that it would be tough to get it replaced for less than that. Such testimony is competent to establish value. State v. Horner, 53 Wn.App. 806, 770 p.2d 1056 (1989).

The testimony of these three witnesses provides sufficient evidence from which a rational trier of fact could have found that Washburn knowingly and maliciously damaged the truck windshield and that the amount of the damage was in excess of $250.00. Accordingly, any issue as to the sufficiency of the evidence to convict is clearly without merit.

ISSUE 2: The second issue arises out of Washburn's pro se assignments of error. He alleges that the trial court erred in not dismissing the case; in failing to declare a mistrial; in failing to grant a retrial and in failing to observe the constitutional rights of the accused and his passengers. He alleges that defense attorneys Johnson and Kimberly failed to gather adequate facts regarding prior damage to Nichols' vehicle before to get the case dismissed, rather than merely

attempting to plea bargain it down to a misdemeanor.

Washburn's first assignment of error is to some extent another challenge to the sufficiency of the evidence and has been dealt with already.

The remainder of this portion of the assignment of error incorporates a trial brief submitted by Washburn in which he alleges certain constitutional violations. He alleges that his First Amendment freedom of religion rights were violated. This argument is somewhat confused but it appears to rest on the contention that Washburn was an ordained priest at the time of the incident and acted as he did out of religious beliefs. This argument is completely unsupported by authority or the facts presented at trial. Washburn next argues that his Fourth Amendment rights were violated because there was

really no damage to the windshield after he struck it, and that the officer arrested him knowing there was no damage and that the officer or the owner of the vehicle later struck the windshield and caused the damage, and that he was therefore arrested without probable cause. This argument is completely unsupported by the record before the trial court. Washburn next argues that his Fifth Amendment rights were violated because he was allowed to testify at trial and because of his attorneys' attempts prior to trial to settle the matter. This argument is also unsupported by authority and is also largely unsupported by the record. Washburn next argues that his Sixth Amendment rights were violated in that he did not have the proper witnesses at trial. He alleges that his attorneys should have called the gas station

manager, the mechanic who actually did the repairs to the damaged vehicle, and expert psychiatric witnesses. He also alleges that his attorneys should have obtained an itemized list of repairs from the insurance company which paid for most of the damage. Washburn did not say how these inactions violate his Sixth Amendment rights. There is no showing that the gas station manager's testimony would have been of any benefit. The testimony of the mechanic who actually did the repairs presumably would have supported the State's case. To the extent that Washburn suggests that the mechanic would have testified that the windshield damage was not caused by him, his contention is entirely speculative. There is no showing that any expert witnesses would have been either available or of assistance to the defense. The contention

that an itemized list of repairs would have assisted Washburn's case is also unsupported by the record. Washburn finally alleges that his Eighth Amendment right to bail was violated by the setting of a $5,000 bail prior to trial. There is no argument supporting this contention, no authority cited for it, and no record supporting even the facts on which it is based.

All of Washburn's constitutional arguments are entirely frivolous.

Washburn's final contention is that his defense attorneys failed to gain adequate facts prior to trial. He alleges that if they had properly investigated the case, they would have discovered that the vehicle had prior damage and the case would have been dismissed. This contention is entirely lacking in factual

support and is accordingly also without merit.

Now, therefore, it is hereby ORDERED that the motion on the merits is granted and the judgment of the trial court is affirmed; and, it is further]

ORDERED that the time for filing a motion to modify pursuant to RAP 17.7 is extended by an additional 20 days. RAP 18.8(a). Accordingly, any motion must be filed within 30 days of the date of this ruling, i.e., on or before August 7, 1991. If a motion to modify is not filed, the commissioner's ruling becomes final and appellate review is terminated. **State v. Rolax**, **supra**, at 135-36.

DONE this 8th day of July, 1991.

\s\ William H. Ellis
COURT COMMISSIONER

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent. v. DAVID MICHAEL WASHBURN, Appellant.	NO. 25704-8-I ORDER DENYING MOTION TO MODIFY

David Washburn filed a motion to modify the commissioner's ruling granting a motion on the merits and affirming the decision of the trial court. A panel of this court has considered the matter pursuant to RAP 17.7 and State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

DATED this 18th day of November, 1991.

/s/ Agid, J.

/s/ Grosse, C.J.

/s/ Baker, J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 58874-I
v.	)	C\A NO. 25704-8-I
DAVID M. WASHBURN, Petitioner.	)	

This matter came before Department I of the Court on its March 3, 1992, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 3rd day of March, 1992.

/s/Fred H. Dore
CHIEF JUSTICE

REPORT OF PROCEEDINGS, pp. 157-8:

(The following proceedings were held outside the presence of the jury)

MR. KIMBERLY: Your Honor, the only thing that I want to put on the record before we begin tomorrow at this point is to move to dismiss the charges. There's been a charge of Malicious Mischief in the Second Degree, which requires proof beyond a reasonable doubt that damage was done to the property of another in the amount of $250.00 or more.

In this case we've got testimony that the victim paid a hundred dollars. We've got some tenuous testimony about the value of the windshield of a 1989 Nissan truck which would be $275.00, but nothing to relate that to this case to show that the damage was actually sustained to Mr. Nichols' vehicle in that amount. He well

could have paid less; he well could have paid more.

But what a windshield would cost in Whatcom County would have no bearing on Mr. Nichols, on what Mr.Nichols paid or what damage he sustained in King County. We have no evidence in this record as to what amount of damages that he sustained other than a hundred dollars. This would certainly make this qualified for Malicious Mischief 3, but there's no evidence in the record to sustain a Malicious Mischief 2.

THE COURT: The motion will be denied for the following reasons: Taking all the inferences in favor of the nonmoving party, we have enough testimony here to indicate that $275.00 plus tax damage was done to the windshield of Mr. Nichols.

Mr. Nichols himself has testified that he paid a hundred dollars down after

going out and obtaining some estimates. There's been no testimony from anybody else on the fact the damage here was more than $250 to the property of another or belonging to Mr. Nichols. therefore, your motion to dismiss is denied.

REPORT OF PROCEEDINGS, pp. 138-140:

DIRECT EXAMINATION

BY MR. SESSLER:

Q Can you please state your name and spell the last for the record.

A Richard D. Adelstein, A-D-E-L-S-T-E-I-N.

Q There's a microphone there, if you want to clip it onto your shirt.

A Oh, okay.

Q What is your business address?

A 1512 North State Street, Bellingham, Washington.

Q How are you employed?

A I own a glass company. It's called Lewis Auto Glass.

Q How long have you owned your own business?

A It's been a family operated business. I've been in it 22 years. I've owned it for the past five.

Q Thank you. Does your business involve or concern the replacement of windshields for vehicles?

A Yes.

Q Are you familiar with the prices for replacing windshields?

A Yes.

Q Okay. How many times do you estimate that you've probably replaced a windshield in a vehicle?

A This particular year -- last year probably 4,000 windshields were replaced.

Q Are you familiar with the price that it would take to replace a 1989 Nissan Pickup truck in,

say, September or October of 1989.

A Yes.

Q How much would that be?

MR. KIMBERLY: Same objection.

THE COURT: Overruled. He may answer.

THE WITNESS: $275.00 plus the tax.

BY MR. SESSLER:

Q Okay. Was that the going customary rate in Whatcom County at that time?

A Windshields vary a lot in prices. This particular windshield could sell for $400.00 or $500.00. But $275.00 is a real wholesale .. wholesale price. Pretty tough to get it less than that.

If I was to wholesale it and install it, it would be -- I couldn't wholesale it

for any less. That probably would be real competitive at $275.00.

Q Okay. Would labor be on top of that?

A No. That would include labor.

Q Would it cost more to sell it to an individual? You said that was a wholesale price?

A That would be pretty customary for somebody off the street saying, "I want this windshield. Put it in today, and what can you do it for?"

MR. SESSLER: Okay. I have no further questions.

MR. KIMBERLY: No questions.

THE COURT: Thank you, sir. You're free to go.

Fourteenth Amendment to the United States Constitution, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the loss.

Article I, Section 22 of the Washington State Constitution:

Rights of the Accused.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance to witnesses to his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: "Provided", the route traversed by any railway, coach, train or public conveyance

and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or public conveyance, or any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instant shall any accused person before final judgment be compelled to advance money or foods to secure the rights herein guaranteed.

Revised Code of Washington, Section 9A.48.080:

(1) A person is guilty of malicious mischief in the Second Degree if he knowingly and maliciously:

(a) causes physical damage to the property of another in an amount exceeding $250.00; or

(b) creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, or political subdivision thereof, or a public utility of

mode of public transportation, power or communication; or

(c) not withstanding RCW 16.52.070, causes physical damage, destruction, or injury by amputation, mutilation, castration, or other malicious act to a horse, mule, cow, heifer, bull, steer, swine, goat, or sheep which is the property of another.

(2) Malicious mischief in the Second Degree is a Class C Felony.

Revised Code of Washington 98.48.010(1)(b):

"Damages", in addition to its ordinary meaning, includes any charring, scorching, burning, or breaking, or agricultural or industrial sabotage, and shall include any diminution in value of any property as a consequence of an act.

Revised Code of Washington 9A.56.010(12)(a):

"Value" means the market value of the property or services at the time and in the approximate area of the criminal act.